APPENDIX A

Letter from Petitioner's Counsel to District Director Voultsides

September 6, 1989

Mr. B. E. Voultsides
U. S. Department of Labor OWCP
212 Federal Building
Norfolk, VA 23510

RE: OWCP NO. 5-64541 & 5-63104
Charles A. Pettus v. ITO
Our file 88-166

Dear Mr. Voultsides:

Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the Longshore & Harbor Workers' Compensation Act.

I remain,

Very truly yours,

CHARLES S. MONTAGNA

CSM/pab

APPENDIX B

Letter from Petitioner's Counsel to District Director Voultsides

September 6, 1989

Mr. B. E. Voultsides
U. S. Department of Labor OWCP
212 Federal Building
Norfolk, VA 23510

RE: OWCP NO. 5-64541 & 5-63104
Charles A. Pettus v. ITO
Our file 88-166

Dear Mr. Voultsides:

Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the Longshore & Harbor Workers' Compensation Act.

I remain,

Very truly yours,

CHARLES S. MONTAGNA

CSM/pab

APPENDIX C

Letter from Petitioner's Counsel to District Director Voultsides

December 13, 1989

Mr. B. E. Voultsides
U. S. Department of Labor OWCP
212 Federal Building
Norfolk, VA 23510

RE: OWCP NO. 5-64541 & 5-63104
Charles A. Pettus v. ITO

Dear Mr. Voultsides:

Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [sic] The Longshore & Harbor Workers' Compensation Act.

I remain,

Very truly yours,

CHARLES S. MONTAGNA

CSM/pab

APPENDIX D

Letter from Petitioner's Counsel to District Director Voultsides

January 10, 1991

Mr. B. E. Voultsides
U. S. Department of Labor OWCP
212 Federal Building
Norfolk, VA 23510

RE: OWCP NO. 5-64541 & 5-63104
Charles A. Pettus v. ITO

Dear Bill:

Enclosed with this letter please find photostatic copy of a "Not fit for duty" status slip covering the period 10/3/89 to 10/17/89. I would greatly appreciate it if your would please set this matter down for a conference on the issue of temporary total disability covering the above period.

I remain,

Very truly yours,

CHARLES S. MONTAGNA

CSM/jms
Enclosure
cc: Gerard E.W. Voyer, Esquire

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUN 19 1996
CLERK

(3)

No. 95-1676

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES PETTUS, PETITIONER

v.

I.T.O. CORPORATION OF VIRGINIA AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether a letter to a district director requesting "any and all benefits" that may be due a claimant under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and referencing two previous compensation orders, constitutes an application for review of a compensation case within the meaning of Section 22 of the Act, 33 U.S.C. 922.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Banks v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968)	6, 12
Candado Stevedoring Corp. v. *Willard*, 185 F.2d 232 (2d Cir. 1950)	12, 16
Consolidation Coal Co. v. *Worrell*, 27 F.3d 227 (6th Cir. 1994)	13, 14, 16
Director, OWCP v. *Newport News Shipbuilding & Drydock Co.*, 115 S. Ct. 1278 (1995)	8
Eifler v. *OWCP*, 926 F.2d 663 (7th Cir. 1991)	13, 16
Fireman's Fund Ins. Co. v. *Bergeron*, 493 F.2d 545 (5th Cir. 1974)	6, 9, 12, 15, 16
I.T.O. v. *Benefits Review Bd.*, 563 F.2d 646 (4th Cir. 1977)	8
Intercounty Constr. Corp. v. *Walter*, 422 U.S. 1 (1975)	9
Jessee v. *Director, OWCP*, 5 F.3d 723 (4th Cir. 1993)	13
Madrid v. *Coast MMarine Constr. Co.*, 22 Ben. Rev. Bd. Serv. (MB) 148 (1989)	7
McKinney v. *O'Leary*, 460 F.2d 371 (9th Cir. 1972)	12
National Mines Corp. v. *Carroll*, 64 F.3d 135 (3d Cir. 1995)	12, 16
O'Keeffe v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971)	14

Cases—Continued:	Page
Walker v. *Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137 (9th Cir. 1975)	12
Zapata Haynie Corp. v. *Barnard*, 933 F.2d 256 (4th Cir. 1991)	8
Statutes, regulations and rules:	
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*	12
Longshore and Harbor Workers' Compsensation Act, 33 U.S.C. 901 *et seq.*	2, 11
§ 3, 33 U.S.C. 903	2
§ 13(a), 33 U.S.C. 913(a)	2, 12
§ 19(b), 33 U.S.C. 919(b)	2, 4, 10
§ 19(c), 33 U.S.C. 919(c)	2, 6
§ 19(d), 33 U.S.C. 919(d)	2
§ 21(c), 33 U.S.C. 921(c)	3, 8
§ 22, 33 U.S.C. 922	*passim*
§ 39(a), 33 U.S.C. 939(a)	2
§ 39(b), 33 U.S.C. 939(b)	2
§ 40, 33 U.S.C. 940	2
20 C.F.R.:	
Sections 701.201-701.203	2
Section 701.301(a)(7)	2
Section 702.105	2
Section 702.221	2
Section 702.224	2
Sections 702.311-702.316	2
Sections 702.331-702.350	2
Section 702.373(a)	3
Section 702.373(b)	3
Section 702.373(c)	3
Section 702.373(d)	3
Sections 702.391-702.394	2
Section 802.410	3
Sup. Ct. R.:	
Rule 12.6	8
Rule 15.3	8

Miscellaneous: Page

Office of Workers' Compensation Programs, LHWCA Procedure Manual (1989) 13

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1676

CHARLES PETTUS, PETITIONER

v.

I.T.O. CORPORATION OF VIRGINIA AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. I-XV) is reported at 73 F.3d 523. The decisions and orders of the Benefits Review Board (Pet. App. XVI-XXVIII) and the administrative law judge (Pet. App. XXIX-XXXVIII) are not reported.

JURISDICTION

The court of appeals entered its judgment on January 16, 1996. The petition for a writ of certiorari was filed on April 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, requires employers to pay compensation to maritime workers injured or killed while employed upon the navigable waters of the United States. 33 U.S.C. 903. Individuals seeking compensation must generally file a claim with a district director in the Office of Workers' Compensation Programs (OWCP), United States Department of Labor, within one year after the injury or death. 33 U.S.C. 913(a); 20 C.F.R. 702.221.[1] Within ten days after such claim is filed, the district director notifies the employer and other interested parties that a claim has been filed. 33 U.S.C. 919(b); 20 C.F.R. 702.224. The district director may then investigate and resolve the claim informally. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.311-702.316. If the district director cannot resolve the claim, it is forwarded for a hearing before an administrative law judge (ALJ), who is then empowered to issue a compensation order. 33 U.S.C. 919(d) and (e); 20 C.F.R. 702.331-702.350. An ALJ's decision is reviewable by the Benefits Review Board (Board), 33 U.S.C. 921(b); 20 C.F.R. 702.391-702.394, and a Board

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[1] Although the Act refers throughout to "deputy commissioners" (*e.g.*, 33 U.S.C. 913(a)), both petitioner and respondent I.T.O Corporation correctly point out (Pet. 10 n.2; I.T.O. Br. in Opp. 13 n.3) that the title of the persons performing the statutory duties has been changed to "district director." See 20 C.F.R. 701.301(a)(7), 702.105; see also Pet. App. VII n.2, XIX n.2. Congress provided for the appointment of such persons to perform much of the day-to-day administration of the Act under the authority of the Secretary of Labor and the Director of OWCP. See 33 U.S.C. 939(a) and (b), 940; 20 C.F.R. 701.201-701.203.

decision is reviewable by the court of appeals. 33 U.S.C. 921(c); 20 C.F.R. 802.410.

Section 22 of the Act allows the district director, "[u]pon his own initiative, or upon the application of any party in interest," to review a compensation case "on the ground of a change in conditions or because of a mistake in a determination of fact by the [district director]." 33 U.S.C. 922; see also 20 C.F.R. 702.373(a) and (c). This review is available "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim." 33 U.S.C. 922; see also 20 C.F.R. 702.373(b). On review, the district director follows "the procedure prescribed in respect of claims in section [19] of [the LHWCA]," which, as discussed above, provides for notice to interested parties, investigation and possible informal resolution before the district director, followed by formal adjudication by an ALJ. 33 U.S.C. 922; see also 20 C.F.R. 702.373(a) and (d). In accordance with Section 19, the district director may "issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U.S.C. 922.

2. Petitioner, Charles Pettus, while working as a longshoreman for respondent I.T.O. Corporation, injured his right knee on September 22, 1987, and again on February 1, 1988. Pet. App. III. The injuries resulted in periods of temporary total disability and also caused a permanent partial disability in petitioner's knee. *Id.* at III-IV. On June 1, 1988, petitioner filed timely claims for disability benefits under the LHWCA due to both of the injuries. *Id.* at IV. On August 23, 1989, pursuant to agreement and stipu-

lation by the parties and the investigation made by the district director, the district director entered two orders awarding compensation. In the first case (claim no. 5-63104), the award was based on the injury occurring on September 22, 1987, and the resultant period of temporary total disability from September 23, 1987, to January 31, 1988. *Id.* at XLIII-XLVI. In the second case (claim no. 5-64541), the award was based on the injury occurring on February 1, 1988, and the resultant periods of temporary total disability from March 29 to July 31, 1988, and from August 1 to September 6, 1988, as well as the permanent partial disability to petitioner's knee. *Id.* at XXXIX-XLII. Both orders indicated that the case files were thereby closed "subject to the limitations of the Act or until further order" of the district director. *Id.* at XIX. Respondent complied with the orders and made its last compensation payment to petitioner on August 28, 1989. *Id.* at IV.

On September 6, 1989, petitioner's counsel sent a letter to the district director referencing the claim numbers of the two injuries and compensation orders and stating: "Please be advised that I herewith make demand for any and all benefits that may be due the above claimant pursuant to the [LHWCA]." Pet. App. IV, X. The district director took no action in response to the letter; the district director did not, for example, provide notice to respondent of the letter, as would have been required upon receipt of a claim or request for modification of a claim under 33 U.S.C. 919(b), 922. Pet. App. IV.

Petitioner's injured knee caused him another period of temporary total disability from October 3 to October 17, 1989. Pet. App. IV, XIX. On December 13, 1989, petitioner's counsel sent a letter to the

district director, referencing the prior two claim numbers and stating: "Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA]." *Id.* at V, X. The district director again took no action in response to the letter. *Id.* at V.[2]

On November 14, 1990, petitioner received a "not fit for duty slip" from a physician, supporting petitioner's claim that he suffered a period of temporary total disability from October 3 through October 17, 1989. On January 10, 1991, petitioner sent the slip to the district director along with a letter requesting an informal conference to discuss petitioner's entitlement to disability compensation for that period. Pet. App. V, XX. On January 24, 1991, the district director notified respondent I.T.O. Corporation of an informal conference to be held in February 1991 to discuss that claim, but the conference did not resolve the matter. Respondent I.T.O. Corporation refused to pay disability compensation for the additional period of disability, contending that petitioner's request was not timely under Section 22 of the Act, 33 U.S.C. 922, which requires that claims be made within one year of the date of the last payment of compensation. Pet. App. XXXIV. The district director referred the case to an ALJ, who held a hearing on October 8, 1991,

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[2] Meanwhile, on November 3, 1989, the parties had reached agreement on petitioner's earlier filed attorney's fees petition concerning the claims that had been resolved by the August 1989 compensation orders. The district director entered an Attorney Fee Order on November 27, 1989. Pet. App. IV, XXXIII. During the discussions of the attorney's fees, petitioner's counsel apparently did not mention the additional period of disability that had occurred in October. *Id.* at IV-V, XIII.

pursuant to Section 19(c) of the Act, 33 U.S.C. 919(c), to address whether petitioner's claim for disability compensation for the period from October 3 to October 17, 1989, was time-barred under Section 22 of the LHWCA, 33 U.S.C. 922. Pet. App. V-VI.

3. The ALJ denied petitioner's request for additional compensation. Pet. App. XXIX-XXXVIII. The parties stipulated that petitioner had "suffered an additional period of work-related temporary total disability from October 3, 1989 to October 17, 1989." *Id.* at XXXII. The ALJ found, however, that petitioner's claim for additional compensation for that disability period was time-barred because the last compensation payment under the original compensation orders for his knee injuries had been made on August 28, 1989, and no request for modification of those orders was made within one year of that date, as required by Section 22 of the Act, 33 U.S.C. 922. Pet. App. XXXIV-XXXV.

The ALJ found that petitioner's letters of September and December 1989 did not constitute valid requests for modification of his claims under Section 22. The ALJ acknowledged that the Act does not specify what constitutes a request for modification for purposes of Section 22 and that courts merely require that the request be "a writing which indicates an intention to seek further compensation." Pet. App. XXXVI (citing *Fireman's Fund Ins. Co.* v. *Bergeron*, 493 F.2d 545 (5th Cir. 1974); *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968)). The ALJ nonetheless held that the September 1989 letter did not qualify because it predated the new period of disability and "it is logically impossible to request modification for a change in condition that had not yet occurred." Pet. App. XXXVI. The De-

cember 1989 letter did not qualify because, although submitted after the October 1989 period of disability, it did not, in the ALJ's view, indicate "an intention to seek further compensation on behalf of * * * [petitioner]," but contained "bare assertions of a claim under the Act, unsupported by any foundation, submitted by [petitioner's] counsel immediately after [an] Order[] [was] entered with the intent to avoid or negate the one-year statute of limitations of Section 22." *Id.* at XXXVII.

Petitioner's January 24, 1991, letter to the district director could not constitute a timely request for modification under Section 22 because it was filed more than one year after August 28, 1989. Thus, the ALJ ruled that petitioner's claim for additional compensation was not timely. Pet. App. XXXVII.

4. The Benefits Review Board reversed. Pet. App. XVI-XXVI. The Board agreed with the ALJ that the September 1989 letter did not constitute a request for modification because it pre-dated petitioner's October 1989 period of temporary total disability. *Id.* at XXIII. The Board disagreed, however, regarding the December 1989 letter. The Board held that, "on the facts of this case," petitioner's December 13, 1989, letter to the district director "constituted a valid request for modification." *Ibid.* The Board emphasized that it "is well settled that a request for modification need not be formal in nature," and that such a request "simply must be a writing which indicates an intention to seek further compensation." *Ibid.* (citing *Madrid* v. *Coast Marine Constr. Co.*, 22 Ben. Rev. Bd. Serv. (MB) 148 (1989)). The Board noted that the December letter "did not specifically reference the October 3, 1989 incident which affected claimant's knee condition," but the Board pointed out

that it "does reference claimant's prior claims for his previous knee injuries, and states: 'Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA].'" Pet. App. XXIII-XXIV. The Board concluded that, even assuming the December letter was filed "as a protective measure," as the ALJ suggested, it did indicate an intention "to seek further compensation with regard to his knee injury." *Id.* at XXIV. Accordingly, the Board reversed the ALJ's decision and modified the order to reflect petitioner's entitlement to compensation in the amount of $790.62 (based on the parties' stipulations) for his period of disability from October 3 through October 17, 1989. *Id.* at III, XXV.

5. The court of appeals reversed and remanded with instructions to deny the compensation claim. Pet. App. I-XV.[3] The court recognized that an appli-

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[3] Respondent Director, Office of Workers' Compensation Programs, was not permitted, under Fourth Circuit precedent, to appear as a respondent in the court of appeals. Pet. App. VI n.1 (citing *I.T.O.* v. *Benefits Review Bd.*, 563 F.2d 646, 648 (4th Cir. 1977)). The Director was permitted to intervene in the action, however, based on the court's finding that the Director had shown good cause to do so "[i]nasmuch as the Director 'administers and enforces the LHWCA [and] this court defers to his interpretation unless it is unreasonable or contrary to Congressional intent.'" Pet. App. VI n.1 (citing *Zapata Haynie Corp.* v. *Barnard*, 933 F.2d 256, 258 (4th Cir. 1991)). Re-spondent I.T.O. suggests (I.T.O. Br. in Opp. iii n.2) that the Director is not a proper party to the proceedings in this Court under *Director, OWCP* v. *Newport News Shipbuilding & Drydock Co.*, 115 S. Ct. 1278 (1995). That case addressed only the question of the Director's standing to seek judicial review of a portion of a particular Board decision under Section 21(c) of the Act, 33 U.S.C. 921(c). The Court concluded that the

cation for review of an existing compensation order under Section 22, 33 U.S.C. 922, "need not meet formal criteria" but, rather, "need only be sufficient to trigger review before the one-year limitations period expires." Pet. App. VIII-IX (citing, *inter alia*, *Fireman's Fund Ins. Co.* v. *Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974); *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 11 (1975) ("§ 922 imposes a 'one-year time limit [] on the power of the [district director] to modify existing orders'")). The court noted that because petitioner's letters in September and December 1989 did not induce the district director to notify respondent or to proceed with any other action (*e.g.*, investigation, conference or hearing), it "appears that the district director did not regard either letter as an application for review under § 922." Pet. App. X. In the court's view, "[h]ad the district director been able to discern such an intention on the part

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Director was not a person "adversely affected or aggrieved" by the Board decision within the meaning of that Section, and thus did not have standing to appeal. The Director participated as the sole petitioner in *Newport News* before this Court. The Court specifically did not address the question of whether the Director was a proper party respondent in the court of appeals, 115 S. Ct. at 1284 n.2, a question that is now before the Court in *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, cert. granted, No. 95-1081 (May 13, 1996). The Director is appearing as a respondent in that case.

Respondent I.T.O. also suggests (I.T.O. Br. in Opp. iii n.2) that the Director should not be listed as a party in the instant case because the Director did not file a response supporting the petition within 20 days, as required by Rule 12.6 of the Rules of this Court. The Director does not support granting the petition for the reasons stated herein and therefore properly files this brief in opposition to the petition under Rule 15.3.

of [petitioner], the district director would have notified I.T.O., the next step in the statutory review process." *Ibid.* (citing 33 U.S.C. 919(b)).

The court of appeals further explained that, although an "application for modification need not meet any particular form, there must be some basis for a reasonable person to conclude that a modification request has been made." Pet. App. XI. The court found that petitioner's letters "were too sparse" to meet that standard because they "made no reference to any change in claimant's condition, to a mistake of fact in the earlier order, to additional evidence concerning claimant's disability, to dissatisfaction with the earlier order, or to anything that would alert a reasonable person that the earlier compensation award might warrant modification." *Id.* at XI-XII. According to the court, petitioner's "letters thus failed to indicate any actual intention on the part of * * * [petitioner] to seek compensation for a particular loss, a factor that is critical in assessing their sufficiency." *Id.* at XII. The court concluded that the September 1989 letter, because it pre-dated the October 1989 additional disability period, could not state an intention on petitioner's part to seek compensation for any particular loss or injury. *Ibid.* The court then ruled that the fact that the September 1989 letter "was sent without cause also taints its twin, the December 1989 letter, which likewise appears to have been nothing more than a protective 'catch-all' filing." *Id.* at XII-XIII. The court also noted that petitioner's counsel failed to mention the October disability while discussing the matter of attorney's fees with respondent I.T.O. and the district director in November 1989. *Id.* at XIII. The court ruled that, "[i]n these circumstances," petitioner "was sleeping

on his rights," and deemed petitioner's claim time-barred. *Ibid.*[4]

ARGUMENT

The court of appeals erred in concluding that petitioner's written demands for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, which also referenced the earlier compensation orders for benefits arising out of petitioner's knee injuries, did not constitute requests for review and modification of the orders within the meaning of Section 22 of the LHWCA, 33 U.S.C. 922. We do not believe that further review by this Court is warranted, however. The court of appeals' ruling did not purport to depart from established legal standards for evaluating the sufficiency of a modification request. Rather, its ruling appears to be limited to the unique factual circumstances in this case, and it is not directly contrary to any specific holding of another court of appeals.

1. The court of appeals incorrectly concluded that petitioner's written demands for benefits did not constitute applications for review under Section 22 of the LHWCA, 33 U.S.C. 922. As the opinions below all recognized, no specific format is required for a written communication to constitute a request for review under Section 22, so long as it indicates an intent to seek further compensation. For example, under Section 22, it is "irrelevant" whether a claim-

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[4] The court also ruled that petitioner's January 1991 letter was not timely because not filed within the statutory time period, and that the December 1989 letter "failed to qualify as a timely filing of a [new] claim under 33 U.S.C. § 913(a)" for the same reasons it did not constitute a modification request under 33 U.S.C. 922. Pet. App. XIII-XIV & n.3.

ant labels an action as "a claim for compensation rather than an application for review so long as the action in fact comes within the scope of the section." *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 n.8 (1968); accord *Candado Stevedoring Corp.* v. *Willard*, 185 F.2d 232, 233 (2d Cir. 1950). Consistent with that principle, courts of appeals have understood that no particular form is necessary to request compensation, either as an initial claim filed under Section 13(a) of the LHWCA or as an application for review under Section 22. See *Fireman's Fund Ins. Co.* v. *Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974) (summarizing "trend of decisions" recognizing that a claim may be any written notice on behalf of a claimant, made within one year, if it "evidenc[es] an intention to make a claim," and holding that a "memorandum recording by the [district director] of the telephone message from claimant's attorney that 'the claimant is permanently [and] totally disable[d] and will file for review under Section 22 of the Act' is sufficient to constitute an application for modification" under Section 22); *Walker* v. *Rothschild Int'l Stevedoring Co.*, 526 F.2d 1137, 1139 (9th Cir. 1975) (physician's filing of report on claimant constituted a claim); *McKinney* v. *O'Leary*, 460 F.2d 371, 372-373 (9th Cir. 1972) (memorandum of oral claim sufficed even though formal claim was filed more than three years after injury).[5]

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[5] See also *National Mines Corp.* v. *Carroll*, 64 F.3d 135, 139 (3d Cir. 1995) (in case brought under Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, which incorporates Section 22 of LHWCA, insurer's letter of controversion requesting medical examination, along with other correspondence with district director, constituted timely request for modification, noting that "informal procedures employed in black lung and long-

In light of this well-established standard, the court below erred in concluding that petitioner's letters were insufficient to constitute requests for modification of a compensation order under Section 22, 33 U.S.C. 922. The letters unmistakably express an intent to seek compensation. The letters specify that they "make demand" (September 1989 letter) and "make claim" (December 1989 letter) for "any and all benefits" (both letters) "that may be due" petitioner pursuant to the LHWCA (September), or which petitioner "may be entitled to pursuant to" the LHWCA (December). See Pet. App. X. Both letters constituted unambiguous requests to be paid benefits

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shore cases never have required the submission of a formal request for modification"); *Consolidation Coal Co.* v. *Worrell*, 27 F.3d 227, 230 (6th Cir. 1994) (in BLBA case, rejecting argument that claim is a modification request "only if the claimant specifically states grounds for modification—as, for example, by identifying a mistake of fact or new evidence," because "statute and regulations give the [district director] authority simply to rethink a prior finding of fact at any time during the first year after a final order on the claim"); *Jessee* v. *Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993) (in BLBA case, modification request need not allege "a smoking-gun factual error, changed conditions, or startling new evidence"); *Eifler* v. *OWCP*, 926 F.2d 663, 667 (7th Cir. 1991) (in BLBA case, modification request "was not artful, but formal pleadings are not required in black lung or longshoremen's cases"). OWCP's administrative policy follows the same approach. It provides, with regard to an initial claim: "[N]o particular form is required to meet the time limitation provisions of the Act, * * *. Any letter or other document containing words of claim will suffice as a claim. A written memorandum, prepared by a [claims examiner] based on an oral communication with the claimant expressing an intention or desire to file a claim, has been held to be sufficient to toll the statute." LHWCA Procedure Manual, ch. 2-201.4.a (1989).

under the Act. Moreover, both letters referred to petitioner's two original compensation orders, "OWCP Nos. 5-64541 & 5-63104." I.T.O. Br. in Opp. App. II, III. By those references, petitioner identified the particular OWCP compensation orders to which his request for benefits payments related. No further information or evidence of intent was required to invoke the Section 22 modification process.

Contrary to the court of appeals' view, the fact that the September 1989 letter pre-dated the October 1989 disability period does not render the letter inadequate for purposes of Section 22 of the LHWCA. Section 22 allows modification not only because of a change in conditions, such as the October 1989 disability period, but also because of a mistake in a determination of fact, which means that a district director can review a case "merely" upon "further reflection on the evidence initially submitted." *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Thus, petitioner's September 1989 letter should have triggered Section 22 review, regardless of the subsequent change in conditions. See also *Consolidation Coal Co.* v. *Worrell*, 27 F.3d 227, 230 (6th Cir. 1994) (claimant need not specify grounds for modification at the time of application). In any event, the December 1989 letter could not have suffered from any such timing "defect," and the court of appeals erred in dismissing it as "taint[ed]" by the September letter. See Pet. App. XII.

The court of appeals appeared to view the district director's failure to respond to the September and December 1989 letters (*i.e.*, his failure to notify respondent I.T.O. or initiate review proceedings under Sections 19 and 22) as virtually conclusive evidence both that the district director "did not

regard either letter as an application for review under § [22]," and that the letters were not, in fact, applications for such review. See Pet. App. X-XI. But inaction by a district director cannot render untimely a claim that is otherwise timely. If that were the rule, the district director could defeat a timely and adequate request by willful or negligent inaction.

2. Notwithstanding the court of appeals' errors, further review is not warranted in this case. Contrary to petitioner's argument (Pet. 10-18), the court of appeals' decision does not directly conflict with the decisions of other courts of appeals. Although cases from other circuits support the proposition, discussed above, that a general writing indicating an intent to seek further compensation under the Act suffices as a request under Section 22, none of the cases involved a factual scenario similar to the one presented here. For example, the Fifth Circuit held in *Fireman's Fund* that a district director's written memorandum of an attorney's telephone call on behalf of a claimant was "sufficient to constitute an application for modification" under Section 22. 493 F.2d at 547. The court below did not dispute the result in *Fireman's Fund*, however, but distinguished it on its facts, which included a detailed claim in the form of a memorandum stating that specific credit amounts were in dispute; that the claimant, whose compensation payments for partial disability had ceased, was permanently totally disabled; and that he intended to "file for a review under § 22 of the Act." *Id.* at 546 (emphasis omitted). The court contrasted petitioner's letters, which it found lacked sufficient detail to "indicate any actual intention on the part of the claimant to seek compensation for a particular loss" or injury. Pet. App. XII; see also *id.* at VIII (agreeing with *Fireman's*

Fund that an application under Section 22 "need not meet formal criteria").[6]

The court of appeals' opinion is similarly distinguishable on its facts from the other appellate decisions cited by petitioner (Pet. 12-17). In *Consolidation Coal Co.* v. *Worrell*, 27 F.3d 227, 229-230 (6th Cir. 1994), the court simply addressed whether to treat a writing captioned as a new claim as a request for modification, and agreed with the Department of Labor's routine treatment of BLBA claims filed within one year of an order denying a previous claim as a request for modification of that order, rather than as an independent duplicative claim. *Id.* at 229. In *National Mines Corp.* v. *Carroll*, 64 F.3d 135, 136-137, 140 (3d Cir. 1995), the court held that a series of communications between employer representatives and the Department of Labor, including a letter of controversion and the submission of medical evidence, constituted a request for modification under Section 22. In *Eifler* v. *OWCP*, 926 F.2d 663, 667 (7th Cir. 1991), the court ruled that a petition for modification raised grounds of both mistake of fact and change of conditions because the petition was accompanied by x-rays and the results of a physical examination. See also *Candado Stevedoring Corp.* v. *Willard*, 185 F.2d at 233 (writing captioned as claim for compensation treated as application for modification under Section

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[6] The Fifth Circuit also stated in *Fireman's Fund* that "[t]he trend of decisions appears to be that any written notice by or on behalf of the claimant within one year evidencing an intention to make a claim will be treated as sufficient to toll the running of the statutory period for filing a claim." 493 F.2d at 547 (emphasis omitted). Petitioner has not sought review in this Court of the holding below (Pet. App. XIV n.3) that he did not timely file a new claim.

22). None of those cases involved a situation comparable to this case, where petitioner's brief letters did not contain any reasons for seeking further compensation.

3. We also disagree with petitioner's contention (Pet. 23-25) that the decision below will necessarily have broad detrimental effects that will undermine the LHWCA's purposes. The court of appeals twice emphasized that "a claimant's application for modification need not meet any particular form." Pet. App. XI; accord *id.* at VIII ("[a]n application of a party in interest need not meet formal criteria"). The court of appeals thereby appeared to agree with other courts that, as a general rule, a modification request need not allege specific grounds. Contrary to petitioner's argument (Pet. 17), we do not construe the decision below as adopting a modification standard "that mandates the strict delineation of grounds and specifics." The court's recitation of perceived deficiencies in petitioner's letters, including the lack of mention of "any particular loss or injury" (Pet. App. XII), is simply an inventory of what the court incorrectly viewed as a lack of any evidence of an intent to seek compensation under Section 22, not a requirement that particular grounds be stated if a writing otherwise indicates an intent to seek compensation. It would be premature to conclude that the court of appeals has substantially departed from the approach of other courts of appeals, instead of merely reaching an erroneous result based on the particular facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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